SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 659

COMCET, INC.,

*Petitioner,*

*vs.*

COMMUNICATIONS SATELLITE CORPORATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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*Petitioner,*

*vs.*

COMMUNICATIONS SATELLITE CORPORATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner COMCET, INC. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered July 14, 1970.

## OPINIONS BELOW.

The opinion of the District Court for the District of Maryland appears in Appendix A hereto and is reported in 300 F. Supp. 559. The opinion of the Court of Appeals, not yet reported, appears in Appendix B hereto.

## JURISDICTION.

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 14, 1970. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Is the test for service mark infringement under § 32(1) of the Lanham Act, 15 U. S. C. § 1114, the mere possibility of confusion, or does the statute require the probability that prospective purchasers will be confused?

2. May the District Court's finding of fact that there is no likelihood of confusion, based on detailed findings from all the evidence, be set aside by the Court of Appeals by merely drawing a conflicting inference from some of the evidence and without determining that the District Court's findings and inferences to the contrary were clearly erroneous?

3. May a common law tradename monopoly be extended beyond the protection afforded by the principles of unfair competition which require proof of the probability that prospective purchasers will be confused?

## STATUTORY PROVISIONS INVOLVED.

The Lanham Act, Section 32(1), 15 U. S. C. § 1114:

Remedies; infringement; innocent infringement by printers and publishers.

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

* * * * *

Federal Rules of Civil Procedure:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law

thereon, and the judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . .

## STATEMENT OF THE CASE.

In this civil action Respondent claims that its registered service mark and tradename, "COMSAT", are infringed by Petitioner's use of the name and mark, "COMCET". Respondent seeks an injunction under the common law and § 32(1) of the Lanham Act, 15 U. S. C. § 1114, but has conceded that it has not proved damage (p. A1). Federal jurisdiction is based on diversity of citizenship and the Lanham Act, 15 U. S. C. § 1051 et seq.

Respondent is a private corporation established pursuant to the Communications Satellite Act, 47 U. S. C. § 701 et seq., and incorporated in the District of Columbia. Its business consists solely of providing global communications services via communications satellites. It is the only entity in the United States authorized to provide such services (Tr. 48, 185-187).[1] Its services are sold to only six customers, of which one is the federal government and five are communications common carriers. It does not manufacture or sell any product commercially nor sell any service to the general public (Tr. 50, 186-187, 593). COMSAT is an acronym for "COMmunications SATellite" and is often written as "ComSat" (Tr. 282-283).

Petitioner is a Maryland corporation engaged in the business of developing, manufacturing and selling computers (Tr. 315, 318-319). Its name and mark "COMCET" is an acronym for "COMputer Communications Engineering

1. The Transcript of Proceedings in the District Court, certified by the Clerk, is referred to herein as "Tr.".

Technology" (Tr. 316-317). Petitioner's and Respondent's letterheads are:

**Computer Communications Engineering Technology**

**COMCET**

1950 W. COUNTY ROAD B-2
ST. PAUL, MINNESOTA 55113
Phone (612) 633-8130

Defendant's Exhibit No. 32(b).

**COMSAT**

**COMMUNICATIONS SATELLITE CORPORATION**

Plaintiff's Exhibit No. 15.

Petitioner's principal product is the "Comcet 60" system consisting of a computer and associated peripheral equipment (Tr. 347, 352). Each system sells for about $200,000 and is designed to be used in connection with large data processing computers, such as the "IBM 360" or "Univac 1108" (Tr. 353-354, 359). A data processing computer is one designed to store data or to perform computations or comparisons of data (Tr. 355-357). These large data processing computers must frequently utilize a significant portion of their capacity in performing the managerial tasks associated with the receipt, editing and verification of incoming data (Tr. 360-361). Data processing computers are not designed to perform these tasks efficiently (Tr. 362). Petitioner's computer is specifically designed for the efficient performance of these tasks, thereby freeing the larger data processing computers to utilize their full capacity for performing more complex tasks (Tr. 319, 361-

362). Petitioner's computer is known in the computer industry as a "communications computer" to distinguish it from a data processing computer (Tr. 317, 358).

Petitioner markets its computers primarily to users of large data processing systems through its own sales staff (Tr. 395-397, 409). In connection with each sale, several months of work are required to adapt and program Petitioner's computer to operate in conjunction with a customer's existing data processing system (Tr. 395-400). The decision to purchase Petitioner's computer is made only after extensive consultation between Petitioner and the prospective customer (Tr. 395-400, 500). The actual purchase decision is made by the customer's most responsible executives and technicians, all of whom are highly sophisticated and knowledgeable in the computer field (Tr. 333-334, 395-398, 500).

During four days of trial District Judge Roszel C. Thomsen saw and heard Petitioner's and Respondent's executive personnel give elaborately detailed testimony concerning their businesses. Judge Thomsen made the following basic findings of fact:

1. The marks of Petitioner and Respondent are both weak. (pp. A12, 15).
2. The parties are in different but sometimes interrelated industries (pp. A7, 13).
3. The circumstances and conditions surrounding the purchase of Respondent's services by its customers and of Petitioner's computers and related hardware and software by its prospective customers are quite dissimilar (pp. A12-14).
4. Prospective purchasers of Petitioner's products and Respondent's services are highly sophisticated and are likely to exercise a high degree of care in learning all the details about each (pp. A13, 15).
5. Petitioner did not intend to derive any benefit from

Respondent's reputation or good will (pp. A12, 15-16).

6. There is no likelihood of confusion arising from Petitioner's use of its name and trademark (p. A16).

Judge Thomsen's opinion (Appendix A) sets forth elaborately detailed findings of fact and conclusions of law in support of the District Court judgment for Petitioner. A review of the evidence in the transcript will demonstrate that the District Court's findings are supported by the overwhelming weight of the evidence.

The Court of Appeals for the Fourth Circuit reversed the District Court's judgment and remanded the case for issuance of an injunction prohibiting Petitioner from using "COMCET" in its name, publicity, advertising, stock sales, general business activity, and trademark (Appendix B, p. B14). It ruled that "COMSAT" is a unique and distinctive word, a strong mark and a famous name (p. B4). The Court held that Respondent is entitled to an injunction on the ground that the possibility of confusion is sufficient to impair the public's interest in accurately identifying the parties' respective businesses and to prejudice Respondent's image (pp. B10-11). The Court ruled further that proof need only be slight (p. B9). The Court of Appeals did not explain how the District Court's findings of fact or inferences drawn therefrom were "clearly erroneous."

## REASONS FOR GRANTING THE WRIT.

### I. THE COURT OF APPEALS MISINTERPRETS AND MISAPPLIES THE INFRINGEMENT STANDARD UNDER THE LANHAM ACT AND THEREBY EXPANDS THE MONOPOLY AFFORDED TRADEMARKS. THE DECISION THUS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AND CONFLICTS WITH DECISIONS IN COURTS OF APPEALS FOR OTHER CIRCUITS.

The Court of Appeals has greatly relaxed the standard of proof to establish infringement under the Lanham Act by requiring only slight evidence of the possibility of confusion. The trademark monopoly created by the Court of Appeals is greatly expanded far beyond the standard of prospective purchaser confusion intended by Congress.

The legislative history of § 32(1) of the Lanham Act proves that Congress intended that a trademark monopoly should exist only if the use of a similar mark will result in the probable confusion of prospective purchasers.[2] In the present case the ordinary prospective purchaser is a corporation considering the purchase of a $200,000 computer system to complement its complex data processing equipment which costs many times more. Infringement rests completely on the probable confusion of an appreciable number of these prospective purchasers; *Shoppers Fair of*

2. §§ 32(1) and 45 of the Lanham Act, 15 U. S. C. §§ 1114 & 1127, were amended in 1962 to delete the words "purchasers as to the source of origin of such goods or services"; Public Law 87-772. The legislative history of the 1962 amendment indicates that the words were deleted because Congress intended to provide a remedy where there is a likelihood of confusion among potential purchasers as well as actual purchasers; S. R. No. 2107, U. S. Cong. & Adm. News, 87th Cong., 2d Sess. (1962), pp. 2844, 2847, 2850, 2851. See *David Sherman Corporation* v. *Heublein, Inc.*, 340 F. 2d 377, 379 (CA 8 1965).

*Arkansas, Inc.* v. *The Sanders Co., Inc.*, 328 F. 2d 496 (CA 8, 1964); *S. C. Johnson & Son, Inc.* v. *Johnson*, 266 F. 2d 129 (CA 6, 1959); *Sun-Maid Raisin Growers of California* v. *Sunaid Food Products, Inc.*, 356 F. 2d 467 (CA 5, 1966).

The District Court ruled that confusion among such prospective purchasers is not likely, weighing all the evidence against the legal standards of proof set forth in the *Restatement of Torts 2d*, Tentative Draft No. 8, §§ 729 and 731. These standards are summarized below and have been applied by Courts of Appeals in the cases indicated by appropriate footnote references.

(a) The degree of resemblance between the marks;[3]

(b) The intent of the alleged infringer in adopting its mark;[4]

(c) the similarity of the goods or services, marketing methods, marketing channels, product functions and uses;[5]

(d) The sophistication of purchasers, the degree of care likely to be exercised by purchasers, and the existence or non-existence of common customers.[6]

Applying the great weight of the evidence against these standards, the only District Court finding of fact favoring

3. *Drexel Enterprises, Inc.* v. *J. R. Richardson*, 312 F. 2d 525 (CA 10 1962); *Sun-Maid Raisin Growers of California* v. *Sunaid Food Products, Inc.*, 356 F. 2d 467 (CA 5, 1966).

4. *Drexel Enterprises, Inc.* v. *J. R. Richardson, supra*; *Shoppers Fair of Arkansas, Inc.* v. *The Sanders Co., Inc.*, 328 F. 2d 496 (CA 8 1964); *S. C. Johnson & Son, Inc.* v. *Johnson*, 266 F. 2d 129 (CA 6 1959).

5. *Drexel Enterprises, Inc.* v. *J. R. Richardson, supra*; *Sun-Maid Raisin Growers of California* v. *Sunaid Food Products, Inc., supra*; *Blazon, Inc.* v. *Blazon Mobile Homes Corporation*, 416 F. 2d 598 (CA 7 1969).

6. *Drexel Enterprises, Inc.* v. *J. R. Richardson, supra*; *General Adjustment Bureau, Inc.* v. *General Insurance Adjustment Company*, 381 F. 2d 991 (CA 10 1967).

Respondent is the resemblance between the marks. The Court of Appeals ruled that Respondent's mark is distinctive, setting aside the District Court finding, and thereby added an additional finding of fact in favor of Respondent. No other supportive finding of fact made by the District Court was set aside on appeal.

Thus, based solely on a comparison of the marks, as against countervailing findings as to every other legal criterion, the Court of Appeals concluded that infringement exists. The opinion of the Court of Appeals clearly demonstrates the panel's reliance on "possibilities" and on its own inferences drawn from some of the evidence (pp. B9, 11-13).

The decision of the Court of Appeals, in failing to apply the established legal standards to all the findings of fact, conflicts directly with the decision of the Tenth Circuit in *Drexel Enterprises, Inc.* v. *J. R. Richardson*, 312 F. 2d 525 (1962), where the Court ruled that the criteria set forth in the *Restatement of Torts* § 729 are the applicable standards for determining the likelihood of confusion among prospective purchasers under § 32(1) of the Lanham Act. On the basis of these legal standards the Tenth Circuit held that the name "Heritage House," used to designate a retail furniture store, did not infringe the furniture trademark "Heritage".

The numerous references to the "possibility" of confusion in the Court of Appeals' opinion in this case clearly indicate that the panel applied an infringement test in violation of that required by the express intention of Congress. It is also in direct conflict with the decision of the Tenth Circuit in *General Adjustment Bureau, Inc.* v. *General Insurance Adjustment Company*, 381 F. 2d 991 (1967) in which the Tenth Circuit ruled that the word "likely" in § 32(1) of the Lanham Act means "probably", not "possibly."

The Court of Appeals in the present case drew inferences and suggested possibilities but failed to acknowledge or apply the established principle that occasional confusion will not sustain an action for infringement under the Lanham Act. The decision of the Court of Appeals is in direct conflict with the decision of the Eighth Circuit in *Shoppers Fair of Arkansas, Inc. v. The Sanders Co., Inc.*, 328 F. 2d 496, 500 (1964) and the decision of the Sixth Circuit in *S. C. Johnson & Son, Inc. v. Johnson*, 266 F. 2d 129, 141 (1959). In *Shoppers Fair*, the Court ruled that the test is whether an appreciable number of prospective purchasers are likely to be confused. In *Johnson*, the Court ruled that "occasional cases of confusion or thoughtless errors by very inattentive purchasers are of very little significance in trademark and unfair competition cases."

The Court of Appeals in the present case held that Petitioner's good faith is immaterial (p. B6) and the possibility of Respondent's expansion into the field of domestic satellite communications is an influential factor (p. B13). The Court's decision is in direct conflict with the decision of the Eighth Circuit in *Shoppers Fair of Arkansas, Inc. v. The Sanders Co., Inc.*, 328 F. 2d 496, 501 (1964), where the Court held the existence or non-existence of good faith by the second user to be a "powerful factor" in determining whether the prior user's name is entitled to protection in an area to which the business it identifies has not actually expanded.

If a Court of Appeals is bound to apply no other findings of fact once it has made a comparison of the marks, the protection afforded by § 32(1) of the Lanham Act creates a broad exclusive trade monopoly not intended by Congress. The Court of Appeals in its opinion cites no decision of its own or any other Court of Appeals which provides even tenuous support for a finding of infringe-

ment where the facts found by the District Court and not set aside on appeal indicate the existence of good faith, sophisticated purchasers, and dissimilar products, marketing methods and customers.[7]

There is no reported case in which the protection under § 32(1) of the Lanham Act has been so dramatically extended. Petitioner urges this Court to consider this important federal question and to settle conflicts between this Fourth Circuit decision and decisions of the Sixth, Eighth and Tenth Circuits.

## II. THE COURT OF APPEALS' VIOLATION OF RULE 52(a) CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The evidence in this case consists mainly of testimony by witnesses of both parties. The witnesses testified in detail about Petitioner's products, Respondent's services and the prospective and present customers of each. The District Court opinion sets forth detailed findings that are based primarily upon the testimony of witnesses seen and heard by Judge Thomsen. The Court of Appeals set aside certain findings of fact made by the District Court, but did

7. In *Durox Company* v. *Durox Paint Manufacturing Company*, 320 F. 2d 882 (CA 4, 1963), a completely different panel of judges affirmed a decision of Judge Thomsen holding that there was no likelihood of confusion arising from the use of the mark "Durox" applied to paint additives sold to the automotive specialty trade and "Duron" applied to paint and paint products sold in retail stores. The panel explicitly approved Judge Thomsen's reasoning and analysis of the law which is so clearly reflected in his numerous reported trademark opinions, such as *Durox Company* v. *Duron Paint Manufacturing Company*, 206 F. Supp. 917 (1962); *Huntington National Mattress Co.* v. *Celanese Corporation of America*, 201 F. Supp. 938 (1962); *Sears, Roebuck and Co.* v. *Allstates Trailer Rental, Inc.*, 188 F. Supp. 170 (1960); *Chayt* v. *Darling Retail Shops Corporation*, 175 F. Supp. 462 (1959); and *Perma-Stone Company* v. *Perma-Rock Products, Inc.*, 160 F. Supp. 616 (1958).

not explain how any of the District Court's findings were "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court found that Respondent's name and mark "COMSAT" is weak (pp. A12, 15). It is an acronym, the first syllable of which is one of the most common prefixes in the English language and has a wide popularity in the formation of trademarks (Defendant's Exhibits 22, 23, 25, 43). The editor of the leading trade magazine in the computer industry gave unrefuted testimony that the computer industry is flooded with similar acronyms and that the proliferation is so great that the industry has "become quite accustomed to it" (Tr. 470-471). Respondent's own Director of Marketing testified that he had never seen any advertising by Respondent directed at the general public (Tr. 121). The probative value of Respondent's newspaper clippings and schedule of expenditures for recruitment, financial reports and internal publications was studied and weighed at the trial (Tr. 205-238, 281-284). The evidence indicated and Judge Thomsen found that Respondent's name and mark are less well known than its services (p. A16).

The Court of Appeals improperly set aside these findings and held the opposite, that Respondent's mark is strong and its name is famous (pp. B3-5). The Court of Appeals held that Respondent's acronym is a unique and distinctive word and that secondary meaning has been established by corporate newspaper and magazine publicity, a New York Stock Exchange listing, and expenditures for recruitment, stockholder reports and internal publications (p. B4).

Furthermore, the Court of Appeals set aside the District Court's finding of no likelihood of confusion on the improper ground that "several facts lead to the inference that confusion is likely" (p. B9). The Court of Appeals considered

this case as if it were the original trier of fact. It applied only those fragments of the evidence which tended to support the conflicting inferences drawn by it to reach the conclusion it desired. The Court of Appeals' decision conflicts directly with the principles announced by this Court in *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), and *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949). In *Yellow Cab* this Court stated at 338 U. S. 342,

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

By drawing conflicting inferences to set aside the specific finding of no likelihood of confusion between two trademarks or tradenames, the decision of the Court of Appeals conflicts directly with the decision of the Eighth Circuit in *Checker Food Products Company* v. *Ralston Purina Company*, 232 F. 2d 477 (1956), where the Court held that the issue of confusing similarity is an issue of fact for the trial court and not an issue of law for the Court of Appeals. The Eighth Circuit amplified its decision at pages 480-481 as follows:

> "There is no merit in the plaintiff's contention that confusing similarity was conclusively established by the evidence. What the plaintiff is, in effect, asking this Court to do is to retry this case and to substitute its judgment for that of the trial court. This the Court will not do. [Citing Eighth Circuit cases] The determination of the trial court that there was no confusing similarity between the trademarks in suit and that the defendant had not infringed the plaintiff's trade-mark

rights and had not engaged in unfair competition is not erroneous. The burden of proving confusing similarity was that of the plaintiff, and the defendant, as the prevailing party, is entitled to the benefit of all reasonable inferences which can be drawn from the evidence, viewed in the aspect most favorable to it. [Citing Eighth Circuit cases]"

In accord with the above decision of the Eighth Circuit are decisions of the Tenth Circuit in *Drexel Enterprises, Inc.* v. *J. R. Richardson*, 312 F. 2d 525 (1962) and the Fifth Circuit in *Sun-Maid Raisin Growers of California* v. *Sunaid Food Products, Inc.*, 356 F. 2d 467 (1966).

## III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF MARYLAND.

The Court of Appeals held that injunctive relief under Maryland law is justified if there is the possibility of confusion sufficient to impair the public's interest in accurately identifying the parties' businesses or to prejudice Respondent's image (pp. B10-11). The most recent applicable decision of the Supreme Court of Maryland holds that the criterion is whether the ordinary purchaser will be misled: *A & H Transportation, Inc.* v. *Save Way Stations, Inc.*, 214 Md. 325, 339, 135 A. 2d 289 (Oct. 1957). There is no authority under Maryland law that "proof [of likelihood of confusion] need only be slight", as stated by the Court of Appeals (p. B9).

The District Court's reliance on the *Restatement of Torts* 2d (T. D. No. 8) is well founded. The two principal tradename opinions in Maryland are replete with reliance on the *Restatement*: *A & H Transportation, Inc.* v. *Save Way Stations, Inc.*, *supra*; *National Shoe Stores Company* v. *National Shoes of New York*, 213 Md. 328, 131 A. 2d 909

(May 1957). The Court of Appeals' opinion omits consideration of both the *A & H Transportation* case and the *Restatement*. Chief Judge Roszel C. Thomsen, writing the District Court opinion, is an expert in Maryland law, having long experience in Maryland as a practicing trial lawyer, District Court Judge and professor of commercial law.[8] In contrast, no member of the Court of Appeals panel in this case has a Maryland background.

The Court of Appeals' extension of the common law protection of tradenames grants to Respondent an unauthorized trade monopoly in violation of the federal policy inherent in Section 2 of the Sherman Act.[9] This Court considered the relation of state unfair competition laws to the protection of unpatented products in *Sears, Roebuck & Co.* v. *Stiffel Company*, 376 U. S. 225 (1964), and *Compco Corporation* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964). In *Sears* this Court stated at page 232,

> "Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source, just as it may protect businesses in the use of their

8. Judge Thomsen, born and educated in Maryland, practiced law in Maryland from 1922 to 1954, taught commercial law at Johns Hopkins University from 1933 to 1943, was an instructor at the University of Maryland Law School from 1952 to 1955, became a Federal District Judge for the District of Maryland in 1954, and has been Chief Judge since 1955. Judge Thomsen has been a member of the United States Supreme Court's Advisory Committee on Civil Rules since 1960. *Who's Who in America*, Vol. 36, 1970-1971, p. 2276.

9. Section 2 of the Sherman Act, 15 U. S. C. § 2, provides, "Every person who shall monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a misdemeanor . . ." Section 32(1) of the Lanham Act, 15 U. S. C. § 1114, provides protection to registered marks to the extent that the use of a similar mark is likely to cause confusion among prospective purchasers, but there is no federal statute authorizing a tradename monopoly.

trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods."

The use of tradenames and marks in interstate commerce will be severely restricted if one state grants a broad common law monopoly protection. This serious issue of an unauthorized trade monopoly can be avoided only if the common law principles applicable to tradenames are cast within the concept of unfair competition which requires confusion of prospective purchasers; see *The Supreme Court 1963* Term, 78 Harv. L. Rev. 143, 309-312.

## IV. CONCLUSION.

This case raises important federal questions appropriate for review by this Court under Rule 19. Petitioner urges that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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# APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the District of Maryland.

COMMUNICATIONS SATELLITE CORPORATION,
*vs.*
COMCET, INC.
CIVIL No. 20343.

Filed: June 5, 1969.

Leslie D. Taggart, Frank J. Colucci and Watson, Leavenworth, Kelton & Taggart, and George W. McDonald, Jr., all of New York, New York, William H. Berman, of Washington, D. C., and Russell R. Reno, Jr., and Venable, Baetjer and Howard, of Baltimore, Maryland, for plaintiff.

Joe A. Sutherland and William L. Morrison, of Chicago, Illinois, and Michael P. Crocker, of Baltimore, Maryland, for Defendant.

THOMSEN, *Chief Judge.*

This is a civil action for alleged infringement of plaintiff's trade name and registered service mark COMSAT and for unfair competition. Jurisdiction concededly exists. Plaintiff seeks injunctive relief,[1] but concedes that it has not proved any damages.

1. Plaintiff seeks to enjoin defendant "from using 'COMCET, INC.'; 'COMCET' and any similar notation in the advertising, offering for sale and sale of its securities to the public, from using 'COMCET, INC.', 'COMCET' and any similar notation in the advertising or promotion of any products including communications computers which it proposes to develop, manufacture and market, and from using 'COMCET, INC.', 'COMCET' and any similar notation in connection with its business, including its prospective business of developing, manufacturing and servicing computers, which computers it may in the future develop, and from otherwise competing unfairly with plaintiff."

## Findings of Fact.

### *Plaintiff.*

1. Communications Satellite Corporation (plaintiff) is a District of Columbia corporation, incorporated on February 1, 1963, under the authority of the Communications Satellite Act of 1962 (the Act), 76 Stat. 419, 47 U. S. C. A. 701 *et seq.* The Act declares that it is the policy of the United States to establish as expeditiously as practicable a "commercial communications satellite system", and provides for the creation of a private corporation, subject to appropriate governmental regulation by the Federal Communications Commission (FCC).

2. Plaintiff is a communications common carrier, which provides global communications service via space satellite for the transmission of telephone (voice), television, telegram, teletype and data traffic. It is the only entity in the United States authorized to provide such service, but it competes with companies which offer similar communications services via microwave facilities, high frequency radio or cable. Plaintiff is not authorized by the FCC to provide any communications services via satellite for use between points within the continental United States.

3. Plaintiff is primarily a common carrier's common carrier, since it is authorized by the FCC to sell its satellite communications services only to other communications common carriers and to the Federal Government.[2] The Act does not prohibit the FCC from authorizing plaintiff to provide its communications services directly to others, but the FCC has not done so. Plaintiff sells its services to only six customers: 5 communications common carriers

2. Plaintiff's ancillary activities include research and development at its laboratories and the furnishing of technical assistance to its customers and their customers.

(A. T. & T., I. T. & T., W. U. Int'l, RCA Global Organizations and Hawaii Telephone Co.) and NASA. Plaintiff's customers, except NASA, are also stockholders.

4. Plaintiff does not manufacture or sell any products commercially, and is not authorized by the Act to do so.

5. Plaintiff has used COMSAT as its trade name since early 1964, and since October 1964 has used COMSAT as a service mark for its communications services via satellite. COMSAT is an acronym made up of the first syllable of two descriptive words: "communications" and "satellite".

6. Plaintiff registered its service mark COMSAT in the United States Patent Office for communication services via satellite on May 2, 1967.[3] On December 5, 1967, it made a similar registration[4] of COMSAT, using a globe as a substitute for the letter "O".

7. Plaintiff has spent about a million dollars over the years in promoting its communications services via satellite and in recruiting personnel, using its trade name and mark in such promotion and recruiting. Plaintiff's sales of its services have amounted to many millions of dollars.

8. Plaintiff's stock has been traded on the New York Stock Exchange since September 8, 1964. It is listed in the reports of the New York Stock Exchange results as Comsat.

9. Plaintiff has been referred to as COMSAT or Comsat in national magazine articles and in articles which have appeared in the daily press throughout the country over the past five years.

10. Since plaintiff does not sell its services to the general public, it does little or no advertising. Nevertheless,

3. Registration No. 828,366, in Class 104.

4. Registration No. 841,095, also in Class 104.

as a result of plaintiff's promotional activities and the publicity it has received, COMSAT has become recognized throughout the United States as identifying and distinguishing plaintiff and its communications services.

*Defendant.*

11. Comcet, Inc. (defendant) was incorporated in Maryland on February 5, 1968. It is one of a family of companies related to Comress, Inc., which was incorporated in Maryland in 1962. All of the related companies—Comress, Inc., Computer Network Corporation (Comnet), Commed, Inc., Comcet, Inc., and Computer Microtechnology, Inc.—are engaged in various segments of the computer industry.[5]

12. Defendant is engaged in the business of developing, manufacturing and selling computers and related hardware and software. It has introduced and is now demonstrating and marketing the Comcet 60 Computer Communications System, which combines a computer, memory and interfacing units, monitoring equipment and software. It is designed to handle the communications requirements of a multiterminal system,[6] and thus permit a large and

5. Satellite Computing, Inc., generally known as Satcom, is also related to the Comress group. Satcom is a Virginia corporation, which provides certain services utilizing satellite computers. The term satellite computer is a recognized term in the computer industry and refers to a particular type of computer and not to space satellites used for any purpose. Defendant's president has been a director of Satcom since its incorporation. Comnet, which operates a time-sharing computer network, has furnished to Satcom computer time, which was not being used by Comnet, in return for which Comnet will be entitled to become a stockholder of Satcom to the extent of 51% of its stock.

6. Defendant's computers and related equipment are designed to handle a wide variety of communications circuits and terminal devices, including teletypewriter, voice grade and broad band circuits, as well as remote punch card and line printer units, time-sharing terminals, and graphic display terminals.

relatively expensive data processing computer, such as an IBM 360 or a Univac 1108 (with both of which it is compatible) to realize more fully its data processing potential. Defendant markets its computers through its own sales staff to users of large data processing systems.

13. The Comcet 60 System is priced at about $200,000. A decision to purchase one or more of defendant's computers will be made by executives and top technical personnel after extensive contact and work with defendant's personnel.

14. Defendant's president, Lee Johnson, is widely known in the computer field; he and other members of defendant's management and technical personnel have had many years of experience with computers.

15. In January or February 1968, Johnson and Donald Herman, defendant's chairman, chose Comcet, Inc., as defendant's corporate name, intending to use Comcet or COMCET as its trademark. Comcet is an acronym for computer communications engineering technology. The syllable "Com" was chosen to suggest defendant's products (computers) and its relationship to the Comress family of companies. The letter "c" in the second syllable was chosen because the word "communications" describes the type of computers to be manufactured; the "e" and "t" and the words they represent were chosen to round out a euphonious name, which would aid defendant in establishing a lead in its particular and narrow market in competition with its potential competitors, such as IBM, Control Data, Sperry Rand, General Electric and Honeywell. Some of those companies now make devices which perform somewhat the same function as the Comcet 60, and some or all of those companies may be expected in the near future to produce competitive computers. Defendant did not obtain a trademark search report of similar names. The evidence shows, however, that many two-syllable words having

"com" as the first syllable have been registered. When defendant's chairman and president decided to adopt Comcet as defendant's name and trademark, they knew that plaintiff's trade name and service mark was COMSAT, but they did not believe that they would ever be in competition with COMSAT and did not adopt Comcet or COMCET with any intention of using or obtaining the benefit of whatever good will plaintiff has established for its name and service mark COMSAT.

16. Defendant issued a prospectus on October 15, 1968, in which a certain amount of its common stock was offered to the public at a stated price.[7] Before the prospectus was issued, the Securities and Exchange Commission suggested to defendant by letter dated September 13, 1968, that "A parenthetical phrase disclosing that the registrant is not related to 'Comsat', Communications Satellite Corporation, should be inserted immediately following the registrant's name on the cover page of the prospectus." Defendant decided to follow rather than contest the SEC suggestion, and inserted at the head of its prospectus immediately after its corporate name: "Not related to 'Comsat', Communications Satellite Corporation".

17. Defendant's stock is traded over-the-counter and is generally referred to as Comcet.

18. Promptly after the prospectus was issued, plaintiff complained to defendant of its use of the name Comcet.

19. The 90-day period following the issuance of defendant's prospectus expired one day before this lawsuit was filed. Defendant, therefore, had not advertised any of its products prior to the commencement of the suit, but had prepared "prototype hardware", to which it had attached the mark COMCET 60, and had prepared elaborate advertisements for Comcet 60 systems, which were pub-

7. All of the stock referred to in defendant's prospectus has been sold to the public, except that reserved for designated persons.

lished in "Datamation", a magazine of the computer industry, in its April 1969 issue. Copies of this advertisement have also been circulated among prospective customers during the year 1969.

20. Defendant has received one firm order for six computers from Comnet, one of its related companies. Two independent companies have agreed orally to purchase computers from defendant but have not yet signed formal orders.

*The Relationship Between the Communications and Computer Industries.*

21. Plaintiff and defendant are in different but sometimes interrelated industries.[8]

22. In 1967 plaintiff, in association with IBM, made tests of high speed transmission of data by computers via communication satellite. These tests have demonstrated the potential of plaintiff's satellite system for high speed transmission of data from computer to computer. Plaintiff's communications services are presently utilized by NASA for the transmission of data from computer to computer, and these operations are now being expanded.

23. In December 1968, pursuant to the rules of the FCC, plaintiff established its tariff for wide band (48 KHz channels) communication services via satellite suitable for the high speed transmission of data, and plaintiff is presently marketing such services.

24. Plaintiff used computers (a) to develop information which controls launch maneuvers of a satellite during the period just prior to, during, and just after a launch of a new satellite, (b) to develop pointing data for earth stations

8. In 1966 (Docket No. 16979) the FCC considered the interdependence of computers and communications services, but none of its findings are important on the issues in this case.

to enable them to find the satellite in orbit, lock-on to it, and work with it, and (c) to develop access, a new technique of using the satellite for more than one user, or set of users, on a single communications channel.

25. Data sent from a computer in the United States to a computer in Europe by way of plaintiff's satellite travels from the original computer in the United States through some communications service, such as A. T. & T., to plaintiff's earth station in the United States; thence it is transmitted via plaintiff's satellite to plaintiff's earth station in Europe; thence it is transmitted by a communications carrier to the receiving computer in Europe. If the owner of the receiving computer purchases one of defendant's computers, it will be used as an adjunct to the receiving (data processing) computer, and not as part of plaintiff's communications services.

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS.

The Lanham Act (the Act) as amended October 9, 1962, provides in § 32, 15 U. S. C. A. 1114:

> "(1) Any person who shall, without the consent of the registrant—
>
> "(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; * * * shall be liable in a civil action by the registrant * * *."

Before the 1962 Amendment, § 32(1) included the words "purchasers as to the source or origin of such goods or services" after the word "deceive". The legislative history makes it clear that the reason for eliminating the word "purchasers" was because "the provision actually relates

to potential purchasers as well as to actual purchasers". See particularly Sen. Rep. No. 2107, Sept. 18, 1962, U. S. Code Cong. & Adm. News, pp. 2847; 2850, 2851.

The term "mark" is used in the Lanham Act to include service marks as well as trademarks. § 45 of the Act, 15 U. S. C. A. 1127.

A trade name may, if used as a trademark to identify and distinguish goods or services, also be a trademark. When a trade name has acquired trademark status, it is entitled to protection from infringment the same as any other trademark. *Little Tavern Shops* v. *Davis*, 116 F. 2d 903 (4 Cir. 1941).

The development of the law with respect to infringement of trademarks (whether for goods or services) and trade names is discussed at length in the Restatement of Torts 2d, Tentative Draft No. 8, April 22, 1963, hereinafter referred to as T. D. 8. That draft was discussed at the 40th Annual Meeting of the A. L. I. on May 23, 1963, and the several sections were approved with a few modifications. See A. L. I. Proceedings 1963, pp. 138-194, and 321-323.

Section 717 of T. D. 8, headed "General Statement of Conditions of Infringement", as so modified (op. cit. pp. 156, 163, 164), states in pertinent part:

> "(1) One infringes another's trademark, collective mark or tradename if, without a privilege to do so, he uses on or in connection with his goods, services or business a designation which so resembles the other's previously used mark or tradename as to be likely to cause confusion, mistake or deception by leading prospective purchasers to believe that
>
> "(i) the actor's goods or services are those of the other, or,
>
> "(ii) the actor's goods or services emanate from the same source as the other's goods or services, or

"(iii) the actor's goods or services are approved or sponsored by the other, or

"(iv) the actor's business is the business of, or is in some manner associated or connected with, the other,

even though the actor does not use the designation with a purpose to deceive."

As so modified, § 717 states the prevailing law.

For the reasons stated more fully below, under the discussion of § 729(c-d) of T. D. 8, this Court finds that plaintiff and defendant utilize different marketing channels, and are not competitors. However, the rule stated in § 717 recognizes that rights in a mark may be enforced not only when the alleged infringer is using them on or in connection with goods or services which are in competition with goods or services offered by the owner of the mark, but also in appropriate cases where the goods or services offered by the respective parties are not in competition.[9]

The factors which should be considered in determining whether or not there has been infringement in this case are set out in §§ 729 and 731 of T. D. 8. The only modifications made to those proposed sections at the 1963 meeting were to eliminate the words "for goods or services" after the word "trademark" at the beginning of each section, since the word trademark is defined in § 715 as a mark used for goods or services. See also 15 U. S. C. A. 1127. Brackets surround the words so eliminated in the sections

9. See *American Steel Foundries* v. *Robertson*, 269 U. S. 372, 383 (1926); *Durox Co.* v. *Duron Paint Mfg. Co.*, 320 F. 2d 882 (4 Cir. 1963); *John Walker & Sons, Ltd.* v. *Tampa Cigar Co.*, 222 F. 2d 460 (5 Cir. 1955); *Eskimo Kooler Corp.* v. *Eskimo Pie Corp.*, 235 F. 2d 3 (7 Cir. 1956); *Esquire, Inc.* v. *Esquire Slipper Mfg. Co.*, 243 F. 2d 540 (1 Cir. 1957); *Sears, Roebuck & Co.* v. *Johnson*, 219 F. 2d 590 (3 Cir. 1955); *Chemical Corp. of America* v. *Anheuser-Busch, Inc.*, 306 F. 2d 433 (5 Cir. 1962); *Polaroid Corp.* v. *Polaraid, Inc.*, 319 F. 2d 830 (7 Cir. 1963).

as set out in notes 10 and 11 in the margin. Some of the factors listed in those sections overlap, but they will be considered seriatim, beginning with those listed in § 729, dealing with "Resemblance of Marks".

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10. "§ 729. Factors In Determining Infringement—Resemblance of Marks.

"In determining whether or not an actor's designation infringes another's trademark [for goods or services], collective mark, certification mark or tradename under the rule stated in § 717, the following factors, among others, concerning the designation and the mark or name are important:

"(a) The degree of resemblance between the designation and the other's tradename, trademark or certification mark in

"(i) appearance;
"(ii) pronunciation of the words involved;
"(iii) translation of the words involved;
"(iv) verbal translation of the pictures or designs involved;
"(v) suggestiveness, connotation or meaning of the actor's designation and the tradename, trademark or certification mark involved;

"(b) the intent of the actor in adopting and using the designation;

"(c) the similarity of circumstances and conditions surrounding the purchase of the goods or services involved;

"(d) the degree of care likely to be exercised by purchasers of the goods or services involved."

11. "§ 731. Factors In Determining Infringement—Relationship Between Involved Goods, Services or Business.

"In determining whether or not an actor's designation infringes another's trademark [for goods or services], collective mark, certification mark or tradename under the rule stated in § 717, the following factors, among others, concerning the goods, services or business are important:

"(a) the likelihood that the actor's goods, services or business will be confused with or mistaken for those of the other;

"(b) the likelihood that the other may expand his business so as to compete with the actor;

"(c) the extent to which the goods or services involved have common purchasers or users;

"(d) the extent to which the goods or services involved are sold

(a) The name and mark COMSAT or COMSAT on the one hand and Comcet or COMCET on the other do not look alike. They are, however, often pronounced very much alike, since the first syllable of each is usually accented. Both are weak marks. *Durox Co.* v. *Duron Paint Mfg. Co.*, 320 F. 2d 882 (4 Cir. 1963). Both are acronyms. The first syllable of each is derived from the first syllable of a word in common use, although the words—communications and computer—are different words, with different meanings and connotations. The syllable "com" is used in the names or marks of other companies in the separate but sometimes related fields of communications and computers.

(b) Those who chose and adopted Comcet as a name and trademark did not intend to derive any benefit from plaintiff's reputation or good will. See Finding 15, above. They knew of plaintiff's existence and business when they chose the name, and knew that there was a similarity in the pronunciation of the names, but did not believe that there was any likelihood of confusion, even when the possibility was suggested to them by the SEC and by plaintiff.

(c)-(d) The circumstances and conditions surrounding the purchase of plaintiff's services by its customers and of defendant's computers and related hardware and software by its prospective customers are quite dissimilar, even

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by the same marketing methods and marketed through the same channels;

"(e) the relation between the functions and uses of the goods or services involved;

"(f) the degree of distinctiveness of the mark or trade name;

"(g) the degree of attention usually given to trade symbols in the purchase of the goods or services involved;

"(h) the length of time during which the actor has used the designation;

"(i) the intent of the actor in adopting and using the designation;

"(j) the celebrity of the mark or tradename involved."

when defendant solicits business from the communications common carriers and NASA, who are plaintiff's only customers. The circumstances would continue to be dissimilar even if plaintiff is allowed to offer its services to other business or government entities, and if defendant develops a broader line of "hardware" and "software". From time to time persons who purchase defendant's computers or systems may use various communications services, including plaintiff's. And one of plaintiff's customers—a communications common carrier, NASA or some other agency of the Federal Government—may in the future purchase one or more computers or systems from defendant, but they would not be used as a substitute for or as part of plaintiff's services. In view of the large amounts of money and the high technical competence required of those who purchase and use what is offered by the parties, the representatives of the prospective purchasers are likely to exercise a high degree of care in learning all the details.[12]

The factors listed in § 731, see n. 11, are important in considering the relationship between the goods, services and business of the respective parties.

(§ 731)-(a) For the reasons discussed above, particularly in (c)-(d) under § 729, there is no likelihood that defendant's goods, services or business will be confused with or mistaken for plaintiff's.

(b) It is not likely that either will expand its business to compete with the other.

(c) Plaintiff argues that everyone in the United States is a potential indirect customer of plaintiff, since all may view pictures on television screens, or may hear sounds which have been transmitted via plaintiff's satellites. This is an unwarranted extension of the meaning of the word customer.

12. See *Durox Co.* v. *Duron Paint Mfg. Co.*, supra, 320 F. 2d at 884, 885.

Plaintiff also argues that many businesses are indirect customers of plaintiff, since they use the services of one or more of plaintiff's direct customers, who in turn may use plaintiff's services. Plaintiff's marketing representatives have been in contact with a number of companies throughout the United States which have substantial communications needs, including data traffic. The purpose of these contacts is to interest the companies in utilizing plaintiff's services and then direct them to the appropriate common carrier from which plaintiff's services can be purchased. Some 16 large companies have been contacted both by plaintiff (to urge them to require or request the carrier they employ—A. T. & T., I. T. T. etc.—to make use of plaintiff's services) and by defendant (for the purpose of soliciting sales of its computers). But they normally interview different men, in different divisions of the companies, all of whom are highly sophisticated and knowledgeable in the communications and computer fields. Even though plaintiff may urge some concerns to use directly or indirectly plaintiff's satellites in transmitting data from one computer to another, no one who contemplates purchasing defendant's goods or plaintiff's services is likely to confuse the two.

(d) As found above, the goods and services involved are not marketed through the same channels, or sold by the same marketing methods, unless interviews with sophisticated personnel of large enterprises may be considered the same marketing method.

(e) Plaintiff furnishes communications services via satellite, which may include transmission of data from computer to computer. Defendant manufactures and sells computers, which may be used to receive, sort and store data which has been transmitted part of the way by plain-

tiff's satellite services,[13] as well as for other purposes. In particular instances, plaintiff's services and defendant's computers may both be used by the same customer, but they are not likely to be confused.

(f) As noted in (a) under § 729, plaintiff's mark is a weak mark.

(g) The highly sophisticated and technical nature of the computer business reduces the importance of trade symbols to defendant's potential customers. The common carriers and government officials who are plaintiff's customers are equally knowledgeable.

(h) Defendant has used Comcet as its name since its incorporation early in 1968, but has used it as a trademark only since January 1969, when the 90-day period following the public offering of its stock expired. Defendant advances as an equity in its favor that it is a small company competing with giants, that it has invested substantial sums in bringing its Comcet 60 System to the attention of persons responsible for buying and using large computers, and that it would seriously damage its competitive position to have to change its name now. This appealing argument is minimized by the fact that plaintiff objected to defendant's use of the name and mark before the mark was used in advertising or the name was used to any considerable extent except in the stock offering. Defendant could then have adopted some other name or mark without sustaining the loss of its intervening promotional costs.

Nonetheless, plaintiff is not entitled to prevent defendant's use of the name and mark Comcet unless such use would constitute an infringement of plaintiff's mark, applying the principles now being discussed.

(i) As noted above in (b) under § 729 and in Finding 15, defendant did not intend to appropriate any part of

13. Most such data are now transmitted by cable rather than by plaintiff's services.

plaintiff's goodwill or to derive any benefit from plaintiff's reputation.

(j) Plaintiff's services are celebrated; its name and mark are less well known.

Defendant has not used its trademark COMCET or its trade name Comcet, Inc., in connection with the sale, offering for sale, distribution or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive. Defendant therefore has not violated § 32(1) of the Lanham Act, 15 U. S. C. A. 1114. Nor has there been any infringement under the principles stated in § 717(1) of T. D. 8. Prospective purchasers are not likely to believe: (i) that defendant's goods are those of plaintiff, nor (ii) that they emanate from the same source as plaintiff's services, nor (iii) that they are approved or sponsored by plaintiff, nor (iv) that defendant's business is the business of, or is associated or connected with plaintiff's business.

Plaintiff suggests, however, that the adoption of the name Comcet by defendant, the offering of its stock to the public, and the consequent trading of such stock over-the-counter, has tended to confusion and mistake in the minds of investors who may have bought stock in defendant thinking they were buying stock in plaintiff, and that this may cause some future damage to plaintiff's corporate image. Plaintiff also argues that the use of the name Comcet in defendant's publicity releases and otherwise, although such use may not violate § 32(1) of the Lanham Act, is likely to cause confusion or mistake in the minds of the public generally, even if they are not prospective purchasers of the goods, services or securities of either plaintiff or defendant.

The evidence of possible confusion in the minds of investors consists of only a few items: (1) The suggestion of the SEC, acquiesced in by defendant, that it include

at the head of its prospectus, under the name Comcet, Inc., the words "Not related to 'Comsat', Communications Satellite Corporation"; (2) the testimony of a NASA engineer that his stockbroker from time to time buys for him new issues and other stocks without previous order; that the broker reported to the witness he had bought some shares of Comcet, Inc., and the witness momentarily thought he had bought stock in plaintiff, but quickly realized the difference; and (3) the testimony of the compliance analyst of the firm which distributed defendant's stock offering that no incident of any confusion had been reported to them. The last item carries little weight, but on the whole evidence the Court finds that there is virtually no likelihood of confusion in the minds of investors. Moreover, no damage or likelihood of damage to plaintiff's image in the minds of investors has been proved. The Lanham Act does not seek to protect investors, as such. On the other hand, common law principles may in a proper case protect investors, as well as other members of the public, from confusion, mistake or deceit arising out of the appropriation by one concern of the trade name of another. The evidence in this case, however, does not support a claim to any such relief.

Assuming, without deciding, that any right of action may lie, upon a proper showing, for damage to a plaintiff's corporate image or goodwill in the minds of the man or woman in the street, as distinguished from prospective purchasers of the plaintiff's goods, services or securities, no such showing has been made here.

Defendant has not been guilty of any unfair competition with plaintiff.

Judgment will be entered in favor of the defendant, with costs.

/s/ ROSZEL C. THOMSEN,
*Chief Judge, U. S. District Court.*

# APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 13,822

COMMUNICATIONS SATELLITE CORP., *Appellant*,

*versus*

COMCET, INC., *Appellee*.

Appeal from the United States District Court for the District of Maryland. Roszel C. Thomsen, Chief Judge.

(Argued April 7, 1970 Decided July 14, 1970.)

Before BRYAN, CRAVEN, and BUTZNER, *Circuit Judges*.

Francis C. Browne (Richard G. Kline; Russell R. Reno, Jr., and Venable, Baetjer & Howard; David C. Acheson, William H. Berman, J. Frank Osha, and Browne, Beveridge & Degrandi on brief) for appellant; Joe A. Sutherland (James G. Reynolds; William L. Morrison; Michael P. Crocker and Piper & Marbury; and Gardner, Carton, Douglas, Chilgren & Waud on brief) for appellee.

BUTZNER, *Circuit Judge:*

Communications Satellite Corporation (Comsat), claiming trade name infringement, trademark infringement, and deceptive trade practices, brought this action against Comcet, Inc., to enjoin it from using Comcet as a trade name and trademark.[1] The district judge found that Comsat's services and Comcet's products are dissimilar and noncompetitive; that expansion leading to future competition is improbable; that the parties' customers are highly sophisticated and knowledgeable; and that "there is virtually no likelihood of confusion in the minds of investors." Primarily because of these factors, he concluded that Comcet's goods, services, or business are not likely to be confused with Comsat's. He also held that the evidence was insufficient to show damage to Comsat's image or good will and that Comcet was not guilty of unfair competition. Characterizing Comsat and Comcet as weak marks because they are acronyms derived from words in common use, he ruled that Comcet does not infringe Comsat's trade name or mark.[2] We reverse and remand the case for the entry of a decree enjoining Comcet, Inc., from using Comcet as either a trade name or a trademark.

## I. *Comsat.*

Communications Satellite Corporation, established by the Communications Satellite Act of 1962 [47 U. S. C. §§ 701 *et seq.*], began using Comsat as its trade name shortly after its incorporation early in 1963 and as its service mark in October 1964. Since then, Comsat has

1. Jurisdiction is based on diversity of citizenship—Comsat is a District of Columbia corporation and Comcet is a Maryland corporation—and on the Lanham Act, 15 U. S. C. §§ 1051 et seq.

2. *Communications Satellite Corp.* v. *Comcet, Inc.*, 300 F. Supp. 559 (D. Md. 1969).

become renowned for its world-wide satellite communications system. Although other United States companies provide intercontinental communications service by radio and cable, Comsat alone is authorized to use satellites for this purpose. It furnishes services for all types of communications traffic, including voice, record, data, and television. By its own efforts, or through contracts with others, it conducts extensive research and development, and recently in association with IBM, it tested high speed transmission of data by computers via satellite. NASA now uses its services for the transmission of data from computer to computer.

Comsat is authorized by the Federal Communications Commission to sell global communications service only to other communications common carriers and to the federal government. Presently, it serves NASA and five communications common carriers—AT&T, IT&T, RCA Communications, Western Union International, and Hawaiian Telephone. It seeks to expand the market for its services by inducing many businesses to utilize its satellites through connections with the common carriers it serves. Comsat presently is limited to providing intercontinental communications services, but recently the FCC requested proposals from Comsat and other common carriers for a domestic satellite system. FCC Docket 16495 (1970).

## II. *Comsat's Name and Mark.*

Comsat is a coined word that is not found in any dictionary. No one else is using it as a trade name, trademark, service mark, or for any other purpose. Comsat has only one function. It uniquely identifies the plaintiff's business and services. Contrary to the position taken by Comcet and the conclusion reached by the district judge, we believe Comsat's derivation from *communications* and

*satellite* does not make it a weak mark. In *Durox Co.* v. *Duron Paint Mfg. Co.*, 320 F. 2d 882, 884 (4th Cir. 1963), upon which the defendant relies, we observed that Durox and Duron were weak marks because *Dur* is suggestive. Connoting durability, it rendered the marks descriptive, and it had been used to describe this quality in other marks for protective and decorative coatings.[3] In contrast, while *Com* is the first syllable of many other marks, it is not uniquely descriptive of communications. Indeed, Comcet uses *Com* as an abbreviation for *computers*, and it enjoys wide popularity as a prefix in other marks for abbreviating such words as *community*, *compatible*, *comprehensive*, and *commercial*. Descriptive words, we recognize, are to be accorded only narrow protection as trade names or trademarks, but Comsat, we hold, is not such a word. It is unique and distinctive.

Regardless of its origin, Comsat has established a secondary meaning that qualifies it for protection. Cf. *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 335 (1938). Comsat has spent about a million dollars using its name in promoting services and recruiting personnel. Its sales have amounted to many millions of dollars. Its stock, listed as Comsat, has been traded on the New York Stock Exchange since 1964. National magazines and newspapers frequently refer to the plaintiff by its trade name, Comsat. Indeed, as the district judge observed, "COMSAT has become recognized throughout the United States as identifying and distinguishing plaintiff and its communications services." These facts, coupled with Comsat's uniqueness as a coined word, establish it as a strong mark and a famous name. Cf. *Polaroid Corp.* v. *Polaraid, Inc.*, 319 F. 2d 830, 831 (7th Cir. 1963);

3. But see *In re Dobeckmun Co.*, 286 F. 2d 187 (C. C. P. A. 1960), which rejects an argument based on the descriptive nature of the prefixes *Dura* and *Duro*.

*Telechron, Inc.* v. *Telicon Corp.*, 198 F. 2d 903, 908 (3rd Cir. 1952). As such, it is entitled to broad protection, for counterfeits more successfully prey on strong marks than on weak. See *Arrow Distilleries, Inc.* v. *Globe Brewing Co.*, 117 F. 2d 347, 349 (4th Cir. 1941); Schechter, *The Rational Basis of Trademark Protection;* 40 Harv. L. Rev. 813, 825 (1927).

## III. *Comcet.*

Comcet, Inc., organized in 1968, is one of a family of computer companies related to Comress, Inc.[4] It is not, however, a wholly owned subsidiary, and its stock is traded over the counter. Comcet develops, manufactures, and sells communications computers which receive data over telephone and teletype lines, edit and verify the information, and relay it to data processing computers at appropriate times.

Before this suit was instituted, Comcet had only prepared advertisements and a prototype computer that it called Comcet 60. The advertisements were circulated after suit was filed. Comcet's computers sell for about $200,000. It has received a firm order for six computers from one of its related companies, and tentative orders for two from independent companies.

## IV. *Comcet's Name and Mark.*

The name Comcet was selected in a one-hour meeting of two of the corporation's organizers. *Com* was chosen to suggest *computers* and the corporation's relationship to Comress; *c* stands for *communications; e* and *t* were selected to round out the name with a euphonious ending.

4. Comress in an acronym for *computer research systems* and *software*. Related companies are Computer Network Corporation (Comnet), Commed, Inc., which is an acronym for *computers* and *medicine*, and Computer Microtechnology, Inc.

Comcet, its organizers testified, is an acronym for *computer communications engineering technology*. The district court found that the men who selected Comcet knew of Comsat; that they did not believe Comcet would ever compete with Comsat; and that they did not adopt Comcet with any intention of capitalizing on Comsat's good will.

The Securities and Exchange Commission required Comcet, to state in its prospectus: "Not related to 'Comsat', Communications Satellite Corporation." Moreover, Comsat promptly complained to Comcet of the similarity of names. Comcet, however, declined to change its name and mark.

### V. *Comparison of the Names and Marks.*

There can be no doubt about the resemblance of Comcet to Comsat. They sound almost identical, and visual differences are slight. Whether the test be common law or statute, the likeness is so striking that it is apparent that Comcet—though requested not to do so—is using a colorable imitation of Comsat's name and mark. 15 U. S. C. § 1127; cf. *Telechron, Inc.* v. *Telicon Corp.*, 198 F. 2d 903, 908 (3rd Cir. 1952); *Little Tavern Shops, Inc.* v. *Davis*, 116 F. 2d 903, 906 (4th Cir. 1941); see 3 Callmann, *Unfair Competition, Trademarks and Monopolies* § 82.1(a) (3d ed. 1969). It is moreover, no defense to this action that the defendant's organizers adopted the name, Comcet, without intention to trade on Comsat's image and good will. While evil intent may evidence unfair competition and deception, lack of guile is immaterial. *Best & Co.* v. *Miller*, 167 F. 2d 374, 377 (2d Cir.), *cert. denied*, 335 U. S. 818 (1948); *Edmondson Village Theatre, Inc.* v. *Einbinder*, 208 Md. 38, 116 A. 2d 377, 381 (1955).

## VI. *Trade Name Infringement.*

Quite apart from its claim for trademark protection, Comsat has a distinct and separate cause of action to restrain infringement of its trade name. *Telechron, Inc.* v. *Telicon Corp.*, 97 F. Supp. 131, 141 (D. Del. 1951), *aff'd*, 198 F. 2d 903 (3rd Cir. 1952). Trade name protection finds its genesis in the common law, which in Maryland has been succinctly summarized in *Drive It Yourself Co.* v. *North*, 148 Md. 609, 130 A. 57, 59 (1925), as follows:

> "[The right of a corporation to the exclusive use of its own name] exists at common law, and it includes the further right to prohibit another from using a name so similar to the corporate name as to be calculated to deceive the public."[5]

Following Nims, *Unfair Competition and Trademarks* §§ 10 and 11 (4th ed. 1947), the Maryland Court of Appeals classifies cases dealing with trade name protection into three general categories—(1) cases protecting a name consisting of distinctive, unique or fanciful words; (2) cases where actual fraud and deceit are employed; and (3) cases protecting a name, which, though consisting of words in common use, has acquired a secondary meaning. *National*

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5. Maryland has also adopted a statute, patterned on the Model Corporation Act, prohibiting the use or imitation of trade names. Md. Ann. Code art. 23, § 5(a)(3) (1966). In *National Shoe Stores Co.* v. *National Shoes of N. Y.*, 213 Md. 328, 131 A. 2d 909, 911 (1957), the Court of Appeals construed this statute to restate the common law as set forth in *Drive It Yourself Co.* v. *North*, 148 Md. 609, 130 A. 57, 59 (1925):

> Trade names, as such, are not registrable under the Lanham Act. Courts differ over the extent to which §§ 44(b), (g), (h), and (i) of the Act [15 U. S. C. §§ 1126(b), (g), (h), and (i)] confer federal jurisdiction for the protection of trade names—a question we need not decide here. Compare *Stauffer* v. *Exley*, 184 F. 2d 962 (9th Cir. 1950) with *Royal Lace Paper Works, Inc.* v. *Pest-Guard Products, Inc.*, 240 F. 2d 814 (5th Cir. 1957). See 4 Callmann, *Unfair Competition, Trademarks and Monopolies* § 98.4(e) (3d ed. 1970).

*Shoe Stores Co.* v. *National Shoes of N. Y.*, 213 Md. 328, 131 A. 2d 909, 912 (1957). Comsat falls within the first class of names, for it is distinctive, unique, and fanciful. Authority for affording it broad protection is found in *National Shoe*, where the Court said [131 A. 2d at 912] "usually, the appropriation of such words alone is sufficient to give rise to a protectible right in the name."

A trade name symbolizes the reputation of a business. Consumers are interested in the quality and cost of the goods or services it offers; suppliers are concerned with the prompt payment of bills and credit standing; investors, with financial stability, return and growth; labor, with rates of pay, fringe benefits, and personnel policies; and the general public, with management's participation in public affairs. All of these factors, and more, make up "the communal mosaic in which a business enterprise must fit" and which its trade name reflects. 3 Callmann, *Unfair Competition, Trademarks and Monopolies* § 66.2, at 27 (3d ed. 1969). Infringement of a trade name is a tort touching all of these factors. The gist of the wrong is the "invasion or violation of an individual trade identity." Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 Mich. L. Rev. 967, 990 (1952); see also *National City Bank* v. *National City Window Cleaning Co.*, 174 Ohio 510, 190 N. E. 2d 437, 439 (1963). Judge Learned Hand aptly described the harm of infringement in *Yale Electric Corp.* v. *Robertson*, 26 F. 2d 972, 974 (2d Cir. 1928):

> "This is an injury, even though the borrower does not tarnish [the mark], or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

In most jurisdictions to obtain an injunction against trade name-infringement, a plaintiff must prove that the public will likely be confused about the parties' goods, services, or businesses.[6] With respect to names that have acquired a secondary meaning, the Maryland Court of Appeals has expressly stated that "proof of actual confusion in specific instances is not necessary." *National Shoe Stores Co.* v. *National Shoes of N. Y.*, 213 Md. 328, 131 A. 2d 909, 913 (1957). While Maryland has not spoken of confusion when coined or arbitrary names are involved, we assume, without deciding, that the same rule would apply and that likelihood of confusion must be shown. Proof of this element, however, need only be slight. This is because of the common law's solicitude for unique names and the promptness with which Comsat first warned and then sued to vindicate its right.

The district judge found there is no likelihood of confusion. We are unable to accept this finding because on the entire evidence we are "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). Several facts lead to the inference that confusion is likely. Both companies trade in the same geographical area and frequently solicit the same businesses. Although they do not compete, their services and products are closely related. Only a most perceptive ear can avoid initial confusion between the names when they are spoken, and rumor, which is often more destructive of good will than fact, most frequently travels by word of month.

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6. For the effect of anti-dilution statutes, see Note, *Dilution: Trademark Infringement or Will-O'-the-Wisp?* 77 Harv. L. Rev. 520, 526 (1964).

A business need no longer prove either competition or fraudulent deception. *Standard Oil Co. of N. M.* v. *Standard Oil Co. of Calif.*, 56 F. 2d 973, 978 (10th Cir. 1932); see *Mascaro* v. *Snelling and Snelling*, 250 Md. 215, 243 A. 2d 1, 10, *cert. denied*, 393 U. S. 981 (1968) (dictum).

The Securities and Exchange Commission was quick to detect the possibility of confusion, and for this reason it required Comcet to disclaim affiliation with Comsat. The expertise of the S. E. C. in matters of this kind, we believe, should not lightly be put aside. Moreover, Comcet's acquiescence in the S. E. C.'s decision lends credence to the validity of its ruling. The likelihood of confusion among investors is an adequate predicate for relief. *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472 (3rd Cir.), *cert. denied*, 374 U. S. 806 (1963); Nims, *Unfair Competition and Trademarks* § 91, at 278-79 (4th ed. 1947). And this is so even if the infringer has not yet issued its stock. *Fund of Funds, Ltd.* v. *First American Fund of Funds, Inc.*, 274 F. Supp. 517 (S. D. N. Y. 1967).

Here, quite naturally, proof of actual confusion is slight because the suit was instituted when Comcet was in its infancy. One witness, however, testified he was initially confused when his broker advised him of the purchase of Comcet's stock. The fact that the true identity of Comcet was quickly recognized is of little moment. The significance of this incident is its role as a harbinger of confusion.

Finally, we reiterate that Comsat coined its name first; Comcet followed. In these circumstances Judge Learned Hand's observation in *Lambert Pharmacal Co.* v. *Bolton Chemical Corp.*, 219 F. 325, 326 (S. D. N. Y. 1915) is pertinent:

> "Of course, the burden of proof always rests upon the moving party, but having shown the adoption of a similar trade name, arbitrary in character, I cannot see why speculation as to the chance that it will cause confusion should be at the expense of the man first in the field."

In sum, the evidence establishes that the likelihood of confusion is sufficient to impair the public's interest in

accurately identifying the businesses and to prejudice Comsat's image. Either of these possibilities is enough to justify an injunction to protect Comsat's trade name.

## VI. *Trademark Infringement.*

The plaintiff registered Comsat as its service mark in 1967.[7] Therefore, it is entitled to the protection of the Lanham Act, which provides in part, § 32 [15 U. S. C. § 1114]:

> "(1) Any person who shall, without the consent of the registrant—
>
> "(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;
>
> . . .
>
> "shall be liable in a civil action by the registrant. . . ."

The defendant uses Comcet as a trademark for its products. It presently markets a computer bearing the mark Comcet 60. Comsat acknowledges that its claim of trademark infringement presents a narrower issue than its right to trade name protection. *Cf. Polaroid Corp.* v. *Polaraid, Inc.*, 319 F. 2d 830, 833 (7th Cir. 1963). Nevertheless, it urges, and we agree, that it is entitled to injunctive relief. Here the outcome turns on the likelihood of confusion among prospective customers, but much that we have written about trade name infringement is applicable to the trademark claim, for the issues overlap. Resemblance of the marks is not alone sufficient to establish the likelihood of confusion. Other factors such as

7. Registration No. 828,366, Class 104, May 2, 1967 for COMSAT. Registration No. 841,095, Class 104, December 5, 1967 for COMSAT using a globe as a substitute for the letter "O."

the nature of the goods, the channels of trade, and the class of purchasers must be considered. *American Drill Bushing Co.* v. *Rockwell Mfg. Co.*, 342 F. 2d 1019, 1021 (C. C. P. A. 1965); see *Restatement of Torts* § 731 (1938). When, as here, the parties are not competitors, the issue of infringement hinges on the likelihood of confusion about the source or sponsorship of the defendant's goods and services. *Cf. Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 314 F. 2d 149 (9th Cir.), *cert. denied*, 374 U. S. 830 (1963); *Vogue Co.* v. *Thompson-Hudson Co.*, 300 F. 509 (6th Cir. 1924), *modified*, 6 F. 2d 875 (6th Cir. 1925), *cert. denied*, 273 U. S. 706 (1926); see *Wolff*, *Non-Competing Goods in Trademark Law*, 37 Colum. L. Rev. 582 (1937).

Comcet's products are closely related to Comsat's services. Comcet's computers receive data primarily over facilities of AT&T, one of Comsat's customers. And Comcet's computers can be used to receive data transmitted by Comsat's satellites. Moreover, Comcet seeks to sell its computers to many of the same companies that Comsat solicits. For these reasons, the district court properly found that the parties "are in different but sometimes interrelated industries."

Despite the relationship of the businesses and the resemblance of the marks, Comcet argues that the people who purchase expensive computers and communications services are so sophisticated and knowledgeable that they will not be confused. However, the expertise of purchasers does not always assure the absence of confusion. *American Mfg. Co.* v. *Heald Machine Co.*, 385 F. 2d 456, 458 (C. C. P. A. 1967), *cert. denied*, 393 U. S. 824 (1968); *American Drill Bushing Co.* v. *Rockwell Mfg. Co.*, 342 F. 2d 1019, 1022 (C. C. P. A. 1965). But *cf. Fram Corp.* v. *Boyd*, 230 F. 2d 931, 934 (5th Cir. 1956); *Sunbeam Lighting Co.* v.

*Sunbeam Corp.*, 183 F. 2d 969, 972 (9th Cir. 1950), *cert. denied*, 340 U. S. 920 (1951). See generally 3 Callmann, *Unfair Competition, Trademarks and Monopolies* § 81.2(c) (3d. ed. 1969); *Developments in the Law—Trade-marks and Unfair Competition*, 68 Harv. L. Rev. 814, 862 (1955). Even buyers of specialized equipment may assume that related corporations are the source of noncompetitive goods. Comcet's organizers recognized this fact. They realized that names may connote relationship. One of their reasons for selecting Comcet was to emphasize its connection with Comress, Inc. But to one who is uninitiated in the intricacies of their corporate family, Comcet may more readily suggest relationship to Comsat.

Complementary products, or services, are particularly vulnerable to confusion. *Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 F. 407 (2d Cir. 1917), *cert. denied*, 245 U. S. 672 (1918) (pancake flour and pancake syrup). A reasonable person may well believe that Comcet's communications computers come from a source related to Comsat's communications services. The possibility of confusion is increased because there are firms, such as RCA, that manufacture computers and also offer communications services.

Adding weight, though not decisive, is the fact that since the trial in the district court, the FCC has authorized Comsat to submit a proposal for a domestic satellite system. This offers the possibility of greatly expanding Comsat's field of operations and increasing the number of the parties' common customers.

We conclude, therefore, that the evidence establishes sufficient likelihood of confusion among prospective purchasers about the source or sponsorship of Comcet's computers to justify protection of Comsat's service mark.